Supreme Court, U.S.
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No. 07-584

In The
Supreme Court of the United States

WALTER OWENS, et al.,
Petitioners,

v.

MONSANTO COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether fundamental principles of federalism and *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988), permit a federal district court to enjoin a state court proceeding, purportedly to protect or effectuate its prior judgment, when the federal court did not decide the claims raised in the state court proceeding and, per the federal court's limited retention of jurisdiction, it could not have addressed these claims.

(2) Whether the Petitioners have received due process of law when no court has permitted discovery, held an evidentiary hearing or addressed their state law claims based on the defendant's lack of good faith and fair dealing – where the defendant admitted to structuring a subsequent settlement to avoid its obligations to Petitioners – and the district court below enjoined plaintiffs from pursuing these claims in state court.

PARTIES TO THE PROCEEDINGS

The parties to this action include:

Petitioners: Jennie S. Adams; Otis Adams; Otis J. Adams, Jr.; Otis J. Adams, Sr.; Sabrina D. Akles; Aurora Allen; Bessie L. Allen; Beverly J. Allen; Brenda J. Allen; David Allen; Horace Allen, Jr.; Jasmine Allen; Keeundra Allen; Keith Allen; Kenneth Allen; Noel Allen; Orlando Allen; Sandra R. Allen; Tanganyika U. Allen; Te'airra Allen; Diane D. Allen-Corbin; Sharonda Almon; Cassandra S. Anderson; Victor Anderson; Victoria Anderson; Dashia Angel; Sheila J. Angel; Teresa Y. Armstrong; Josiah Atkins; Paula N. Atkins; Shalea Atkins; Ronesha Austin; Andre Bailey; George R. Bailey; Estate of Lugertha H. Bailey; Willie Bailey, Jr.; Willie N. Bailey-Price; Johnnie L. Baker; Melisha Baker; Presena Baker; Ramarez Baker; Kakaelina Ball; Richard Ball; Martha L. Barlow; Elizabeth B. Barnett; Elizabeth D. Barnett; Gary W. Barnett; Lonnie L. Barnett; Roy G. Barnette; Roy S. Barnette; Shannon G. Barnette; Amie Barnett-Lackey; Karen Baylor; Estate of Shirley M. Baylor; Sherri R. Baylor Devore; Darenda Beard; Raymond R. Beard, Jr.; Kay Y. Beard; Rajean Beard; Roderick S. Beard; Sandra J. Beard; Estella Beavers; Carey Bedell, III; La Tonya Bedell; Quinton Bedell; Enoch Bell; Darren D. Bennett; Charles E. Bennett, Jr.; Derecka Benson; Derrick L. Benson; Shelia M. Benson; Jesse Berry; Mary A. Berry; Estate of Barbara Best; Cora Bethune; Viola Bishop; Noble J. Blackwell; Barbara Bolton; Charles Bolton; Doris Bolton; Geneva Bolton; Tiaun Bolton; Torey Bolton; Henrietta Boozer; Barry B. Bowie, Jr.; Clarence Bowie; Eulando Bowie; Jamol Bowie; Kenydia Bowie; Khadajaih Bowie; Reginald

Bowie, Jr.; Reginald W. Bowie; Rosemary Bowie; Teresa E. Bowie; Darren Q. Boyd; David E. Boyd; Doris J. Boyd; Andre D. Boykin; Marcus S. Boykin; Priscilla A. Boykin; Alphonso Bradford; Irene Brady; Ken Brady; Paschal C. Breaux; Annie Brown; Delores Brown; Grover Brown; Jacqueline P. Brown; Joanne Brown; Keenan Browne; Lolita A. Bullock; Cheryl A. Burks; Justin Burks; Dianne D. Burnett; Gary Burnett; Jacquindalyn Burnett; La Toya Burnett; LaDarius Burnett; Tawandaleur V. Burnett; Terryod Burnett; Francine L. Burt; Gerald Burt; Janice D. Burt; William E. Burt; Allene Burton; Christopher Burton; Gabriel M. Burton; Gloria Burton; Juan Burton; JuJuan Burton; Michelle Burton; Montrel Burton; Montrez Burton; Odies Burton; Quindarious Burton; Sherrod Burton; Sherwood Burton; Tamiko Burton; Timmy Burton; Alvin Bush; Anthony Bush; Donald Bush; Garland Bush; Justice Bush; Mary Bush; Velma Bush; Bobbie Butterworth; Ethan Butterworth; Kaitlyn Butterworth; Luther Bynum; Estate of Catherine Byrd-Miller; Billy Calloway; George Calloway, Jr.; Julia Calloway; LaTonya Calloway; Michael Calloway; Dewey Carlisle; Dewey Carlisle, Jr.; Norma Carmon; Casiem Carr; Crystal Carr; Jeffie Carr, Jr.; Ketoya Carruth; Brandon Carter; Breanka Carter; Brenda Carter; Debra Carter; Eian Carter; John Carter, III; Jonathan Carter; Juvar Carter; Lazarus Carter; Margaret Carter; Maxine Carter; Robert Carter; Samuel Carter; Sharonda Carter; Tangelia Carter; Timothy Carter; Trevontra Carter; William D. Carter; Sharon Carter-Barber; Melissa Carter-Hargitt; Billie G. Caver; Donerick Caver; Renfroe Caver, Jr.; Renfroe Caver, Sr.; Rolando Caver; Shaniquia Caver; Sharon Caver; Sharonda Caver; Ruby Chadwick; Brenda Chappell; Arlonza

Chatman; Terencio Chatman; Demetrious A. Childs; Estate of Emanuel Childs, III; Dennis Christian, Jr.; Dennis D. Christian, Sr.; Jeffery Christian; Jonathan Christian; Phronia Christian; Walter F. Christian, Jr.; Walter Christian, Sr.; Bonnie Clark; Lewis Clark; Ronald Clark; Deangelo Clay; Donnell Clay; Denzel Clegg; Helen T. Clegg; Jamal Clegg; Jermey Clegg; Lakeshia Clegg; Claudette Clency; Cameron Coar; Carol Coar; Jordan Coar; Helen Cochran; Michele Coleman Baker; Aaron Coleman; Arielle Coleman; Darion Coleman; Tyesha Coleman; Brondon Collins; Charles Conditt, Jr.; Charlotte Conditt; Elizabeth Cook; Quintearrious Cooke; Shantearra Cooke; Cordarius Cooper; Sara Cooper; Flora Corbett; Amina Corbin; Princie Couch; Antoinette Cowden; Eric Cowden; Temeka Cowden; Barbara Craig; Shalandra Craig; Augatha Croft; Dantavis Croft; Jennifer Croft; Myrtis Croft; Niesha Croft; Robert Croft; Shandrice Croft; Carolyn L. Crook; Sherika Crook; Lonnie Crowder, Jr.; Marie Cummings; Andra Cunningham; Beatrice Cunningham; Clayton A. Cunningham, Jr.; Clayton A. Cunningham, Sr.; Cynthia Cunningham; Daryl Cunningham; David Cunningham; Estate of Gary Cunningham; Johann Cunningham; Kibbra D. Cunningham; Margaret C. Cunningham; Sarah E. Cunningham; Simonia Cunningham; Rashonda Curry; Rodney L. Curry; Tamia Curry; Tiffany Curry; Belinda Dark; Charles Dark; Christopher Dark; Kimberly Dark; Michael Dark; Sara Dark; Ambrea Davis; Angela M. Davis; Austin Davis, Sr.; Betty Davis; Candy Davis; Carl W. Davis; Charles E. Davis; Cherry L. Davis; Curley V. Davis; Gwendolyn Davis; Jeffery Davis; Jeffery Davis, Jr.; Jessie Davis; Montiquilla Davis; Randolph Davis; Teonna Davis; Tiffany V. Davis; Jessica Davis-Bonds; Duntaveus Denison;

Shakiba Denison; Judy Dennard; Kenneth Dennard; Kenneth Dennard, Jr.; Takeshia Dennard; Taneshia Dennard; Tyeshia Dennard; Gladys Denny; William H. Denny; Charles Denson; Cordelra Denson; Inez Denson; Taffeta Denson; Chris DeRamus; Mary Deramus; Cedric R. Dorman; Deja Dorman; LeShanda Dorman; Jennifer Douthit; Vivian Douthit; Denecia Dreuitt; Derrick Dreuitt; Fredderick Dreuitt; Marion Dreuitt; Marrissa Dreuitt; Mary A. Dreuitt; Mary L. Dreuitt; Nigel Dreuitt; Sherry Dreuitt; Stephanie Dreuitt; Yvonne Dreuitt; Antonia Dudley; Archie Dudley; Dyventre Dudley; Ella Dudley; Gladdie Dudley; Gladys Dudley; Jamarcus Dudley; Kendall Dudley; Nikki Dudley; Reuben Dudley; Walter Dudley; Gladys Dudley-Thornton; Adrianna Dukes; Alexandria Dukes; Carolyn A. Dukes; Caurshma Dukes; Demetrius Dukes; Horace Dukes, Jr.; Lashonda Dukes; Estate of Louise Dukes; Maebelle Dukes; Magic Dukes; Ola Dukes; Rosie Dukes; Horace Dukes, Sr.; Tameshia Dukes; Tanya Dukes; Teddrick Dukes; Alexandria Duncan; Marquetta Duncan; Quinnota Duncan; Richard Duncan; Sanquetta Duncan; Deandra Dupree; Dominique Dupree; J.C. Dye, Jr.; Antonio D. Dye; Benny M. Dye; Estate of Carrie B. Dye; Catherine D. Dye; Donald Dye; Elbert Dye; Glenda E. Dye; Jasmine Dye; LaVonta Dye; Willie L. Dye; Autumn Edwards; Beatrice Edwards; Charles Edwards, Sr.; Elizabeth S. Edwards; John Edwards, Jr.; Marilyn Y. Edwards; Mary A. Edwards; Milton A. Edwards; Pita Edwards; Ronnie D. Edwards; Shelia Edwards; Estate of Walter L. Edwards, Jr.; Estate of Alberta Elston; Annie L. Elston; Estate of Bonnie Elston; David Elston; Estate of Franklin D. Elston; Glenn M. Elston; Harriett M. Elston; Jakelli Elston; Jameka Elston; James A. Elston; John W. Elston, Jr.; Joyce A. Elston;

Kasie Elston; Kelly D. Elston; Lee R. Elston; Lester W. Elston; Shameka Elston; Shanequa Elston; Sharon T. Elston; Shedric J. Elston; Willie E. Elston, Sr.; Thomas M. Elston; Wallace Elston; Willie E. Elston, Jr.; Mary Elston Ragland; Susie M. Elston-Young; Chandreka Emory; Chanika Emory; Christina Emory; Monica Emory; Kimberly English; Mary L. English; Obie English, Jr.; Estate of Obie English, III; Roderick English; Vanessa N. English; Ramona E. English-Holloway; Michael Evans; Mary E. Everett; Angela Ferrell; Tierra Fields; Tekoia Fitten Harris; Aleshia Fluker; Dorothy S. Fonfield; Menickey Ford; Norita Ford; Tyrone Ford, Jr.; Lucinda Foster; Roderick Franklin; Estate of Houston Frazier; Solomon Frazier; Louise Freeman; Susan Fuller; Malik Gamble; Mae J. Gardfrey; Eloise Mealing as Executor of Estate of Lonnie Garrett; LaKeitha W. Garrett; Pearlia Garrett; Keitra Gatlin; Rebecca Gay; Brenda W. Gholston; Dolly Gibbons; Dennis J. Gibson; Flossie Gibson; Frederick B. Gibson; Harold D. Gibson; Tamatha Gibson; Wayne Gibson; Wendell Gibson; Jarvis Gill; Wesley Gillespie; Angela M. Gilliam; Christopher Gilliam; Althea Gillins; Clinton Gillins; Karry W. Gillins; Jamesetta Glover; Carolyn V. Golden; Melody Golden; Paul Golden, Jr.; Weslie Golden; Alisa A. Gooden; Aurelia Gooden; Benny Gooden, Jr.; Kizzie S. Gooden; Monica Gooden; Shirley G. Gooden; Brenda A. Goodman; Ericka E. Goodman; Kristan Goodman; Marcus Goodman; Tina L. Goodman; Christopher Goodson; Davina C. Goodson; Maggie H. Goodson; Mark Goodson; Sheffton Goodson; Claudia M. Gordon; Dalauna Gordon; Parthelia Gordon; Mary Goree; Alia Grant; Brenda S. Grant; Jeremy Grant; Jim M. Grant; Jimiah Grant; Matthew Grant, Jr.; Rebertha Grant; Sherry W. Grant; Bonita

L. Gray; Joezette Gray; Joseph Gray, Jr.; Estate of Sandy E. Green; Joshua Green; Nathan Gregory; Porsha N. Gregory; Colleen E. Griffin; Kenneth Griffin; LaToya Griffin; Phyllis Griffin; Barbara B. Griggs; Estate of Corine Groce; Cynthia D. Groce; Daniel R. Groce; Druesilla Groce; Linda J. Groce; Estate of Lorene Groce; Raphael Groce; Estate of Raymond Groce; Roosevelt Groce; Estate of Willie A. Groce; Quinndarius Guyden; Shelia Guyden; Jacquelyn Hall; James H. Hall; Justin Hall; Estate of Dorothy G. Hammock; Michael Hampton; Sandra L. Harleston; Alice B. Harris; Billy Harris; Cedric Harris; Darline C. Harris; Estate of David L. Harris; Deloris Harris; Doris Harris; Ernest L. Harris, Jr.; Ernest L. Harris, III; Eugene Harris; Florene Harris; James D. Harris; Monica Harris; Pearlie D. Harris; R.C. Harris; Stacy Harris; Sylvester Harris, Jr.; Sylvester Harris, Sr.; Taylor Harris; Jacquel Harris-Russell; Commodore Harrison; Nikisha Harrison; Ora L. Harrison; Quiyaun Harrison; Monique A. Haskins; Sarah Haskins; Juanita Hawes; Lesley Hawes; Mary L. Hawes; Shawn Hawes; Wesley Hawes; Margaret P. Hawk; Hollis Hawkins; Lakeya Hayden; Chandra D. Haynes; Jamia Haynes; Patricia A. Haynes; Tara L. Haynes; Ysatis Haynes; Carlton N. Heard; Gloria L. Heard; Kalid Heard; Kenneth T. Heard; Samuel Heard, Sr.; Torrance L. Heard; Cynthia R. Heath; Marie Heath; Tangee D. Heath; Donerick Heflin; Mary Heflin; Sonya R. Heflin; Saoma Heflin; Gary H. Henderson; Doll V. Henry; Edward L. Henry; Estate of Nannie Hicks; Sonya L. Hicks; Dan Hill; Nona K. Hill; Ramonica L. Hill; Romie L. Hill; Barbara Jean L. Hinton; John Hinton; Charles Holley; Christopher Holloway; Levita Houston; Myron Houston; Myrone O. Houston; Sherman Houston, Jr.; Tyrone Houston; Odessa

Howard; Quinneshia Howard; Donna R. Howell; Tashawn Howell; Charles Hubbard; Yolanda L. Hughley Gaither; Annette R. Hughley; Barbara A. Hughley; Christopher D. Hughley; Darrell D. Hughley; Demario Hughley; Jarrell Hughley; Louis Hughley; Nellie L. Hughley; Reginald F. Hughley; Rodquez Hughley; Samuel Hughley; Samuel B. Hughley, Jr.; Santa Hughley; Shalanda Hughley; Veronica M. Hughley; Vershona Hughley; Anita L. Ingram; Kedrick Ingram; Arneke C. Ivy; Della A. Jackson; Dennis B. Jackson, Sr.; Elsie D. Jackson; Eva J. Jackson; Evan Jackson; General L. Jackson; Geneva B. Jackson; Estate of Jacqueline Jackson; Keenan Jackson; Larry W. Jackson; LaShaundra P. Jackson; Leslie D. Jackson; Louis C. Jackson, Jr.; Patricia A. Jackson; Ronald W. Jackson; Ruth S. Jackson; Sylvia Y. Jackson; Teresa R. Jackson; Tia Jackson; Betty J. Jacobs; Christopher Jacobs, Jr.; Christopher R. Jacobs, Sr.; Cynthia D. Jacobs; Deborah B. Jacobs; Donald Jacobs; Ollie Jacobs; LaShundra James; Maggie V. James; Sherry Jemison; Leamon Jenkins; Amey C. Jernigan; Andrew Jernigan; Anthony Jernigan; Agnes M. Johnson; Alfred J. Johnson; Alice F. Johnson; Brenda L. Johnson; Celia Johnson; Daisy L. Johnson; Dewayne Johnson, Sr.; Doretha Ann Johnson; Dovie H. Johnson; Eddie B. Johnson; Eddie H. Johnson; Ervin P. Johnson; Ethel M. Johnson; Felicia Johnson; Frederick B. Johnson; James Johnson; John E. Johnson, Jr.; John E. Johnson, Sr.; John P. Johnson; Larry S. Johnson; Michael Johnson; Terry L. Johnson; Estate of Thomas B. Johnson; Willie J. Johnson; Charles Jones; Derrionte Jones; Devin Jones; Donta P. Jones; Evelyn T. Jones; Jaquanna Jones; Joan Jones; Lashondra Jones; Valerie Jones; Mable F. Jones; Christopher Joshua; James E. Joshua; LaSandra L.

Justice; Marsha L. Justice; Gerald Keith; Janet K. Keller; Lurlie A. Kelley; Tina Kelley; Carolyn Kelly; Harold Kelly; Harold D. Kelly; Harold R. Kelly; Khadeshia Kelly; Moesha Kelly; Ralphette L. Kelly; ShaQuil Kelly; Ariya Kendrick; Charles E. Kendrick; Cheryl R. Kendrick; Leah Kendrick; Michael Kirkland; Terrie A. Kirkland; Martina J. Kirksey; Tyrome L. Kirksey; Clement D. Knight; LaRuth Knox; Minnie E. Knox; Quntus L. Knox; Estate of Della M. Kohen· Gary Kohen; Isaac Kohen, Jr.; Tristan Lackey; Derrick W. Lawler; Gary M. Lawler; Juanita M. Lawler; Kenya L. Lawler; Texanna Lawson; Gwendolyn M. Ledwell; Ashley Leonard; Brittney Leonard; Chris D. Leonard; Corene A. Leonard; Javis Leonard; John E. Leonard; Pamela Leonard; Vera L. Leonard; Estate of Billy D. Lewis; Dewon Q. Lewis; Eddie D. Lewis; Michael Lewis; Samuel Lilly; Estella Lindsey; Gayle A. Lindsey; George S. Lindsey; Larry D. Lindsey; Lester J. Lindsey; Denard E. Lipscombe; Brandon Little; Ivy Little; Luretta G. Little; Christopher A. Lloyd; Alvin P. Long; Donald A. Long; Dorothy L. Long; Frank M. Long, Jr.; Frank M. Long, Sr.; Jerry R. Long; Kasey Long; Lachanda Long; Linda G. Long; Melvin E. Long; Quentin Long, Jr.; Quentin L. Long; Sydney F. Long; Terence Long; Timothy W. Long; Tyrell Long; Jean A. Lovett; Geraldine N. Loving; Pasante D. Loving; Daniel E. Lowe; Steve T. Lowe; Lila M. Lumpkins; Alicia Lynch; Alicia M. Lynch; Alisa Lynch; Arthur Lynch; Arthur J. Lynch, Sr.; Arthur L. Lynch; Chanteka Lynch; LaQetta Lynch; Leander Lynch; Linda Y. Lynch; Lizzie B. Lynch; Lonzo Lynch, Jr.; Lonzo Lynch, Sr.; Estate of Willie M. Lynch; Estate of Ernest L. Macon; Roderick M. Macon; Dedra Maffett; Marcellus Maffett; Nathaniel Maffett, Sr.; Teretha I. Maffett; Glory A. Mallard; LaSundra Mallard; Robin

R. Mallard; Terrence Mallard; Torre Mallard; Juan Malloy; Mary A. Malloy; Curtis Mann; LaDreka Marks; Latonya Marks; Melder M. Marks; Iona E. Marshall; Miya Marshall; Stephone Marshall; Estate of Charles Martin; Darris Martin; Lollisa E. Martin; Deneen E. Mason; Cedric Mason, Jr.; Mary E. Mason; Neal Mason; Roderick Mason; Areyauna Mathews; Perry D. Mathis; Carrie Y. Maxberry; Erica G. Mayweather; Tae'lor Mayweather; Tavia Mayweather; Christopher McCain; Krendal McCain; Kryshunda McCain; Krystal McCain; Minnie P. McCain; William E. McCain; Willie McCain; Estate of Claude McClain; Estate of Ernest L. McClain; Michael McClellan; Thelma G. McClellan; Vonda D. McClellan; Vonta McClellan; Vanessa A. McCollough; Harry J. McCord; Patrick M. McCord; Terry B. McCord; Tony McCord; William F. McCord; Robert L. McCray; Estate of Danny W. McCurdy; Estate of Gregory McCurdy; Estate of Jessie McCurdy, Jr.; Jessie E. McCurdy; Larry McCurdy; Linda J. McCurdy; Lucille McCurdy; Angela R. McKelvey; Irene C. McKenzie; Walter McLane; Phillip McLean; Catherine E. McLester; Ronald D. McLester; Sherman D. McLester; William E. McLester; Deonna McNabb; Turon McNutt; Quince D. McRath; Quinten A. McRath; Rhonda McRath; Timothy E. McRath; Vanessa D. McRath; Emma McWilliams; Keith McWilliams; Quatise L. McWilliams; Aaron Meadows; Lois Meadows; Eloise Mealing; Estate of Franklin Mealing; Thad Mealing, Jr.; Andrea Mignott; Annette R. Mignott; Antonio Mignott; Betty J. Miksell; Estate of Jesse Milan; Michael A. Miles; Mitchell Miles; Alvin Miller; Alvina A. Miller; Billy J. Miller; Curtis L. Miller; Dorothy A. Miller; Felix S. Miller; Gaynelle Miller; LaKimberly Miller; Tundenesia Miller; Tycoma Miller; Winifred D.

Miller-Newell; Frank J. Milton; Winnie M. Milton; Aubrey L. Mims; Kerri Mims; Ruth S. Mims; Terry L. Mims; Alice M. Mixon; Garron Mixon; Gerome Mixon; JoAnn M. Mixon-Pearson; Aliza Montgomery; Andre L. Montgomery; Angela M. Montgomery; Anthony Montgomery; Jamad Montgomery; James Montgomery, Jr.; James D. Montgomery, Sr.; Johnnie E. Montgomery; Johnnie E. Montgomery, Jr.; LaRita W. Montgomery; Mark Montgomery; Mary R. Montgomery; Xavier Montgomery; Carl Montley; Arlene F. Moore; Estate of Willie F. Moore; Willie Moore, Jr.; Quincy Moore; Carolyn M. Morris; Estate of Thelma L. Morris; Theodis Morris; Darryle W. Moss; Earnestine Moss; Kenneth Moss; Lanetta M. Moss; Robert L. Moss; Mary A. Moten; Rosalind C. Moten; Alfred L. Munford; Charlie L. Munford; Earnestine E. Munford; James L. Munford; Robert D. Munford; Timothy E. Munford; Corderrius Murphy; Cordney Murphy; Derrick L. Murphy; Elizabeth S. Murphy; Anna F. Myles; Shinika Myriee; Syvalouis Nance, III; Breun Newell; Dock Newell; Dante D. Nixon; DeNai D. Nixon; Dorothy A. Nixon; John T. Nixon; Lawrence Nixon; Lillie S. Nixon; Louise D. Nixon; Maurice Nixon; Myles Nixon; Tanja T. Nixon; Alfred Noel; Frankie M. Noel; Juwana Noel; Morris T. Noel; Quintella R. Noel; Ralph Noel, Jr.; Ralph Noel, Sr.; Tammy L. Noel; Chanita Norfleet; Debra M. Norfleet; Jennifer Norfleet; Nichelle L. Norfleet; Debbie R. Norris; Deborah Norris; Earnest A. Norris; Vincent Norris; Anyiah Northard; Cedric L. Northard; Felicia T. Northard; Jada Northard; Tarrence L. Northard; Christine Nunn; Ida M. Nunn; Johnny Nunn, Jr.; Lakiesha Nunn; Lasandra Nunn; LaTasha Nunn; Ronald Nunn; William J. Nunn; Calvin C. Oden; Joyce T. Oden; Kenyatta N. Oden; Anthony Oliver; David

Oliver; Walter Owens; Cora L. Palmore; Felicia A. Palmore; Herbert N. Palmore; Jamaal Palmore; James C. Palmore; Dempsey D. Palmore, Jr.; Lula M. Palmore; Rachel B. Palmore; Timothy L. Palmore; Eunice L. Parker; Nisheia Parker; Antonio Parson; Justin Parson; Rosetta Parson; Gwendolyn D. Pate; Jerry L. Pate; Robert L. Pate; Carlos Pearson; Emily J. Pearson; Santoria Pearson; DeAndre Perry; Vivian Y. Perry; Mattie L. Peters; Robert Phillips; Tangula R. Pointer Chatman; Bobbie J. Pointer; Earnest Pointer; India Pointer; Jacqueline D. Pointer; Lavonda Pointer; Lorenzo D. Pointer; Shacarra Pointer; Tanisha Pointer; Teuntay Pointer; Vivian Pointer; Willie C. Pointer; Channing B. Pope; Shundrika Pope; Takeem Pope; Sonja M. Pope-Almon; Bridget R. Pope-Sanders; Iola B. Powell; Jamal Powell; Michael A. Powell; Whitney Powell; Cyretta A. Price; Larry H. Price; Gregory D. Pruitt; Quintonie B. Pruitt; Tre Pruitt; LaFayette Ragland; Bradley Raines; Irma J. Raines; Shareka T. Ramsey; Brian D. Ray; Brinda R. Ray; Carie D. Ray; Jaywarren Ray; Shaquitta Ray; Marquita Reed; Anthony J. Reese; Beatrice Reese; Cassandra Reese; Corey C. Reese; Emma E. Odessa Reese; Kevin Reese; Lamar Reese; Marvin Reese; Rodney E. Reese; Javille Reid; Mary M. Reid; Willie Reid; Margaret A. Rhodes; Dorothy Richardson; Anitra L. Richmond; Carol D. Richmond; Clayton L. Richmond; Colette Richmond; Edward Richmond; Eric D. Richmond; Lemoine Richmond, Jr.; Lemoine K. Richmond, Sr.; Estate of Martha A. Richmond; Michael E. Richmond; Montrez Richmond; Ricky A. Richmond; Valerie K. Richmond; William Richmond; Chad Rimpsey; Freddy V. Rimpsey, Jr.; Essie S. Rimpsey-Hatton; Britney Rivera; Kimberly D. Rivera; Essie P. Roach; Brandon Roberts; Cassandra F.

Roberts; Jerry L. Roberts; Juerrod L. Roberts; Sarah F. Roberts; Derric L. Robinson; Donrico T. Robinson; Doris W. Robinson; Elizabeth L. Robinson; Estate of Barbara Robinson; Josetra Robinson; Justin Robinson; Latoya C. Robinson; Mary S. Robinson; Ronald Robinson; Vandon L. Robinson; Alexandria Rogers; Bernice A. Rogers; Brittany Rogers; Ellisha Rogers; Kimberly T. Rogers; Moneka Rogers; Xavier Rogers; Cameron Rogers-Bell; Corlan C. Roscoe; Bobby M. Ross; Freddie L. Ross; Robert L. Ross; Kimberly Rowe; Monica D. Rowe; Torrey Rowe; Amauri Royal; Lattisha R. Royal; Quindarious Royal; Quinton Royal; Ethel C. Royal-Thomas; Archie Rush, Jr.; Clinton Rush; Cynthia Rush; Ebony Rush; Eva M. Rush; Fannie Rush; Jacqueline Rush; Janice Rush; Kendall Rush; Kotero Rush; Marquese K. Rush; Tamara Rush; Tiffany Rush; Victoria Rush; Jerry W. Russell; Joshua Russell; Mary B. Russell; Michael Russell; Michelle Russell; Ola M. Russell; Alice F. Rutledge; Aisha J. Sabree; Isa Sabree; Jerome Sabree; Muhammad Sabree; Yusuf Sabree; Zahra Sabree; Zainab Sabree; Zakia Sabree; Kimani Sadler; Emma Saffold; James Saffold, Jr.; JiyWaune Saffold; Joe J. Saffold; John Q. Saffold; Lee E. Saffold; Linda G. Saffold; Rosie Saffold; Sheldric Saffold; Jasmine Safford; John W. Safford; LaKeytra Safford; Lenora Safford; Marquez Safford; Mary V. Safford; Myterrius Safford; Ray Safford; Roland E. Safford; Rosie N. Safford; Terencio Safford; Thomas S. Safford; Trenton Safford; TySel Safford; Wanda F. Safford; Alfonso T. Sanford; Braxton Sanford; Brenton Sanford; Ramona E. Sanford; Tramia Sanford; Joanie N. Sankey; Derrick Satcher; Gy Ju Juan Satcher, Sr.; Lamar Satcher; Melvin Satcher; Rosie E. Satcher; Sandra K. Satcher; LaVern Scales; Mario Scales; Matthew Scales; Michael E. Scales, Jr.;

Michael E. Scales, Sr.; Miriah Scales; Shamika Scales; Aubriana Scott; Bessie L. Scott; Cedric M. Scott; Frederick Scott; Frederick D. Scott, Sr.; Shean Scott, Jr.; Chandra Shellenbarger; Alice W. Sigler; Broderick Sigler; James A. Sigler; Roderick Sigler; Sammy L. Sigler; Vashon Sigler; Jol nie M. Sims; Juleian Sims; Romel Sims; Stanley Sims; Tomarcus Sims; Van A. Sims; Annette Sistrunk; Phyllis J. Slater; Aaron Smith; Amber Smith; Andrea Smith; Andrew Smith, Jr.; Andrew R. Smith; Annie L. Smith; Austin Smith; Betty A. Smith; Billy E. Smith; Bridgett M. Smith; Carrie D. Smith; Cassandra R. Smith; Cheryl L. Smith; Cleothus Smith; Deborah D. Smith; Denesha Smith; Donald Smith; Dondra Smith; Eldred Smith; Gwendolyn M. Smith; Jashiya Smith; Jeremiah Smith, Jr.; Estate of Jeremiah Smith, Sr.; Jonathan F. Smith; Justin Smith; Leon K. Smith; Lester C. Smith, Sr.; Lillie A. Smith; Mary I. Smith; Millie C. Smith; Nathaniel M. Smith; Nicholas M. Smith; Pamela D. Smith; Precious Smith; Quinterrius Smith; Ray A. Smith; Theresa N. Smith; Estate of Horace Snowden; Lenora N. Sparks; Cora D. Speights; Quindarious Stanley; Tamika L. Stanley; Willie E. Stanley; Alma L. Sterling; Diane Sterling; Earnest E. Sterling; Fredrick N. Sterling; Ilene Sterling; John H. Sterling, Jr.; John H. Sterling, Sr.; LaBrent E. Sterling; Melvin Sterling; Stephen Sterling; Billy Stevens; Brittney Stevens; Deion Stevens; Delreco Stevens; Shurbie L. Stevens; Tameca L. Stevens; Dwayne Stewart; Billy Stokes, Jr.; Jontario Stokes; SeCreata E. Stokes-Sims; Tykwan Sturges; Tyshawn Sturges; Estate of Helen Sumlin; Franklin Summers, Jr.; Anthony Swain; Danielle Swain; Deborah Swain; Deborah D. Swain; James K. Swain; Janet Swain; Melba Swain; Calvin Sygler; Vandie N. Sykes; Annie B. Tarrance; Brandy C.

Tarrance; Charles E. Tarrance; Elmyra S. Tarrance; Melvin L. Tarrance; Tiffany N. Tarrance; Christiauna Tarrant; Ava Tate; Cheryl Tate; Eugene Tate; Mary Tate; Beonica Taylor; Bradley Taylor; Hazel C. Taylor; LeMerian Taylor; Malik Taylor; Teresa A. Taylor; Patricia B. Tharpe; Ahlania N. Thomas; Aquita S. Thomas; Ashley Thomas; Benjamin B. Thomas; C'airra Thomas; Chester C. Thomas; Corey Thomas; DeCarlo M. Thomas; Delois E. Thomas; Deloris Thomas; Derek Thomas; Desmond E. Thomas; Eartherlene Thomas; Essie M. Thomas; Heflin Thomas; Jammeus Thomas; Jermelle Thomas; Jimmy T. Thomas; Ke'airra Thomas; Linda F. Thomas; Markietta Thomas; Marquise Thomas; Myron R. Thomas; Otis Thomas, Jr.; Parthenia Thomas; Rosheena Thomas; Tedarell Thomas; Trenton D. Thomas; Van H. Thomas; Vicki L. Thomas; Willie L. Thomas; James E. Thompson; Robert Thornton; Bronya C. Tignor; Corri Tignor; Melanie Tignor; Melody Tignor; Edith Tolan; Taja Tolan; Essie L. Toliver; LaShundra G. Trammell; Omari Trammell; Roderick D. Trammell; Sabrina Trammell; Aisha Turner; Alesha Turner; Alma J. Turner; Angel Turner; Barbara J. Turner; Benjamin Turner; Burnese S. Turner; Dashad Turner; Delricko Turner; Freddie Turner; Freddie L. Turner, Sr.; James Turner; James A. Turner, Jr.; Estate of James A. Turner, Sr.; Joyce F. Turner; Lakeisa S. Turner; LaQuita Turner; Mattie Turner; Patrina C. Turner; Ronald A. Turner; Shaquan Turner; Sirnoviar P. Turner; Tracy R. Turner; Willie F. Turner; Estate of Willie M. Turner; Darius Tyler; Jasmine Vincent; Bessie D. Walker; Bobby L. Walker; Britney Walker; Carl E. Walker; Charlene Walker; Earnest Walker; Ernest Walker, Jr.; Fredrick M. Walker; Fredricka L. Walker; Henry L. Walker; Jemayca Walker; Jermaine

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Roderick Wills; Alex J. Wilson; Dale C. Wilson; Dean Wilson; Fatima S. Wilson; Gail Wilson; Jamarcus Wilson; Johnny E. Wilson; Larry G. Wilson; Lewis E. Wilson; Lottie M. Wilson; Malik Wilson; Markieth Wilson; Mataja Wilson; Patrick L. Wilson; Estate of Phillip Wilson, Jr.; Priscilla Wilson; Roberta Wilson; Estate of Superior Wilson; Taleshia Wilson; Travis L. Wilson, Sr.; Viola E. Wilson; William E. Wilson; William M. Wilson; Willie D. Wilson; Kenneth Wise; Pamela S. Wise; Demario Wofford; Lannie L. Wood; Shandrika Woodruff; Shante S. Woodruff; Tracy Woodruff, Jr.; Andre Woods; Antonio Woods; Charles Woods; HyShanna R. Woods; Lavoris Woods; Santina Y. Woods; Tamisha Woods; Alfonza W. Wright; Charles M. Wright; Lorenzo L. Wright; Mary E. Wright; Vonneetta S. Wright; Alicia M Wynn; Arielle Wynn; Jaylen Wynn; Allen B. Young, Jr.; Bobby E. Young; Dania L. Young; Ella L. Young; Gabrielle Young; Gerald Young; Katina F. Young; Khadijah Young; Morris Young, Jr.; Morris W. Young, Sr.; Nikita N. Young; Quinton Young; Rachel A. Young; Raymond K. Young; Sonya D. Young; Stanley Young; Susie E. Young; Telita Young; Terionte Young; Linda G. Yuille; Estate of Alberta Zachary; Estate of Homer L. Zachary; Kimberly L. Zachary; Brenda B. Zech; Dwight F. Zech; Lillie Zech.

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None of the opinions below were published. The opinions of the United States District Court for the Northern District of Alabama issuing the injunction and enforcing the parties' settlement agreement are in Appendices C and F, respectively. (App. C, 6a - 16a; App. F, 21a - 38a). The Eleventh Circuit Court of Appeals' opinion on the appeal of the injunction is in Appendix B, (App. B, 3a -5a), and its order denying rehearing and rehearing *en banc* is in Appendix A (App. A, 1a - 2a). The opinions of the Eleventh Circuit Court of Appeals on related appeals of the enforcement of the settlement agreement are reproduced in Appendices D and E, respectively. (App. D, 17a - 18a and App. E, 19a-20a).

JURISDICTION

The Court of Appeals issued its Order on January 5, 2006. The Court of Appeals denied Petitioners' timely Petition for Rehearing or Rehearing *En Banc* on August 2, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The District Court below issued an injunction, enjoining Petitioners from pursuing claims before the Circuit Court of St. Louis County, Missouri. Thus, the District Court's decision implicated the Anti-Injunction Act, 28 U.S.C. § 2283:

> A court of the United States may not grant an injunction to stay proceedings in a State Court

> except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

This case also implicates the interplay between the Anti-Injunction Act and the All Writs Act, 28 U.S.C. § 1651. The All Writs Act provides in relevant part:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

Nearly 1,600 African American Petitioners sued Monsanto for damages due to PCB contamination and exposure from Monsanto's plant near their homes in Anniston, Alabama. Three weeks into trial, the Petitioners reached a settlement that included a Most Favored Nations Clause (MFNC). This MFNC was integral to the settlement because, at the time the settlement was reached, Monsanto was a defendant in two other cases in which thousands of predominately white Alabamians were suing Monsanto for injuries stemming from PCB exposure in Anniston. The MFNC required Monsanto to pay Petitioners additional sums if Monsanto paid more money, per capita, to settle other Anniston PCB cases. (Record 201; 231 at 5). The initial "per capita" calculation was based on the division of $33 million by the number of Petitioners. The total initial payment was $40 million, but the parties agreed to exclude $7 million (18.5% of

the total) designated for separate funds not to be paid to all Petitioners from the per capita calculation. The District Court approved the settlement and retained "continuing jurisdiction of this matter for the purpose of enforcing the Settlement Agreement, as permitted by *Bender v. Allegra*, 130 F.3d 990 (11th Cir. 1997)." (Record 201 at 3).

Monsanto settled a related case, *Abernathy v. Monsanto Co.*, for $300 million, triggering the MFNC. (Record 231, Ex. 2; Record 249 at 5). The *Abernathy* settlement purported to allocate $225 million (75% of the total) to "funds" that mimicked those excluded from the initial per capita calculation. Petitioners moved to enforce their settlement agreement and sought discovery regarding the amount paid per capita to *Abernathy* plaintiffs. (Record 231).

The District Court refused to permit discovery or hold an evidentiary hearing in regard to the amount paid per capita; however, Monsanto admitted that it intentionally structured the *Abernathy* settlement to avoid triggering the MFNC. (Record 258 at 17). The District Court, without a summary judgment motion pending and with no record evidence, made factual findings as to the nature of the disputed "funds," excluded all $225 million from the per capita calculation, and found, as a matter of fact, that Monsanto owed Petitioners only $1.3 million under the MFNC.

Petitioners' attempts to appropriately create a record to demonstrate that the *Abernathy* plaintiffs received direct payments from excluded "funds" were denied outright by both the District Court and the

Eleventh Circuit. Petitioners' appeals were unsuccessful.

Despite Petitioners' attempts to raise and address their contentions that Monsanto failed to act in good faith in its structuring of the later settlement to avoid payments under the MFNC, the opinions on the motion to enforce addressed only the express language of the settlement agreements, finding it unambiguous. The Eleventh Circuit affirmed and denied rehearing.

Petitioners filed suit in the Circuit Court of St. Louis County, Missouri, where Monsanto is headquartered, to pursue state law claims that Monsanto failed to act in accordance with its duty of good faith and fair dealing and acted fraudulently in its intentional structuring of the *Abernathy* settlement to avoid the MFNC. In response, Monsanto asked the federal District Court in Alabama to permanently enjoin the Missouri action. It did so, explaining its injunction as necessary to protect or effectuate its prior order on the motion to enforce under the All Writs Act and the relitigation exception to the Anti-Injunction Act. (App. C at 14a – 15a).

The District Court interpreted its earlier order on the motion to enforce as addressing "the duty of the defendants to deal fairly with the plaintiffs . . . ." (App. C at 14a). It did not. That order was silent in regard to whether Monsanto acted in good faith. (App. F, 21a – 38a). Despite Petitioners' repeated attempts to obtain discovery and an evidentiary hearing on the good faith question, Petitioners have yet to be heard by any court on that crucial issue.

Neither the District Judge nor Monsanto disclosed two facts that raised questions regarding the District Court's impartiality, and neither complied with a Local Rule governing potential recusals. First, in November 2003, W. Stancil Starnes, of Starnes & Atchison, entered his appearance on behalf of Monsanto. Unbeknownst to Petitioners, Starnes & Atchison had recently hired the District Judge's son as an attorney in its litigation practice. Second, the day before the District Court heard Petitioners' motion to enforce, J. Mark White entered his appearance on behalf of Monsanto. Unbeknownst to Petitioners, Mr. White successfully represented the District Judge in a case regarding her retirement benefits from the State of Alabama. *See Johnson v. Bd. of Control of the Employees' Retirement Sys. of Alabama*, 740 So. 2d 999 (Ala. 1999). Petitioners raised these issues when Monsanto sought the injunction, but the District Court denied the motion to recuse.

The Eleventh Circuit affirmed the District Court's injunction and recusal rulings in a *per curiam* order. (App. B at 3a -5a). The Eleventh Circuit observed that the District Court had applied its subjective view of its prior order in issuing the injunction, as it had "enjoined plaintiffs from, in the [district] court's view, attempting to challenge the court's October 2003 order[1] . . . ." (App. B at 5a).

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[1] It appears that the order referenced by the Eleventh Circuit is the District Court's January 8, 2004 order on plaintiffs' motion to enforce the settlement agreement. The motion to enforce was filed on October 28, 2003, and the district court's order was entered on January 8, 2004. (App. C at 7a - 8a).

After Petitioners sought rehearing or rehearing *en banc*, the Eleventh Circuit took the rare step of asking Monsanto to respond to the petition for rehearing. (*See* 11th Cir. R. 35-6 ("[a] response to a petition for *en banc* consideration may not be filed unless requested by the court."). Thereafter, the Eleventh Circuit considered the Petition for Rehearing or Rehearing *En Banc* for more than eighteen months. Nonetheless, it ultimately issued a one-sentence Order denying rehearing. (App. A at 2a).

The federal courts have thus stymied Petitioners in their attempts to get any court, state or federal, trial or appellate, to consider the merits of whether Monsanto's admittedly intentional structuring of the *Abernathy* settlement to avoid the MFNC violated its obligation of good faith and fair dealing to Petitioners and provided other claims under state law.

REASONS FOR GRANTING THE PETITION

The District Court's injunction of state court proceedings that involved an issue that it did not decide and that was not within its jurisdiction raises important federalism questions – as well as fundamental questions of due process and the impartiality of the courts.

I. The Opinions Below Conflict with this Court's Anti-Injunction Act Jurisprudence, per *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988).

Principles of federalism, with very limited and narrow exceptions, preclude federal court intervention into state court proceedings:

> Due in no small part to the fundamental constitutional independence of the States, Congress adopted a general policy under which state proceedings "should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court."

Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 146 (1988) (quoting *Atlantic Coast Line R.R. Co. v. Locomotive Eng'rs,* 398 U.S. 281, 287, 90 S. Ct. 1739, 1743 (1970)). *Chick Kam Choo*, issued nearly twenty years ago, provides this Court's most recent substantive guidance on the Anti-Injunction Act and its narrow exceptions.

In accordance with these federalism principles, the Anti-Injunction Act, 28 U.S.C. § 2283, generally prohibits federal courts from interfering with proceedings in state courts:

> A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its

jurisdiction, or to protect or effectuate its judgments.

By barring intervention except in the most limited circumstances, "the Act forestalls 'the inevitable friction between the state and federal courts that ensues from the injunction of state judicial proceedings by a federal court.'" *Chick Kam Choo,* 486 U.S. at 146. The Anti-Injunction Act's exceptions "are narrow" and are "not to be enlarged by loose statutory construction." *Id.* As this Court has explained, "[t]his is not a statute conveying a broad general policy for appropriate ad hoc application. Legislative policy is here expressed in a clear-cut prohibition qualified by only specifically defined exceptions." *Amalgamated Clothing Workers of Am. v. Richman Bros.*, 348 U.S. 511, 515-16, 75 S. Ct. 452, 455 (1955). A federal court cannot enjoin state court proceedings unless one of the three exceptions, narrowly construed, exists. *Chick Kam Choo,* 486 U.S. at 146.

The District Court below invoked the relitigation exception, contending that its injunction was necessary "to protect or effectuate" its prior judgment regarding the MFNC. As explained in *Chick Kam Choo*, however, this exception cannot be applied here because the prior judgment only interpreted the settlement agreements per their express terms, without addressing the question of good faith and fair dealing.

A. The Relitigation Exception Is Inapplicable Because the Prior Orders Never Addressed Petitioners' State Law Claims.

The relitigation exception is much narrower than the preclusion doctrines of *res judicata* and collateral estoppel. It only permits a court to "prevent state litigation of an issue that previously was ***presented to and decided by*** the federal court." *Chick Kam Choo,* 486 U.S. at 147 (emphasis added). Per *Chick Kam Choo*, the following rules govern the relitigation exception:

- A federal court may not rewrite an earlier order or infer from its prior orders a decision on any issue;

- It must appear from the face of the earlier order that an issue was "***actually decided***" (emphasis added);

- The court must "assess[] the precise state of the record and what the earlier federal court order *actually* said" (emphasis in original); and

- A federal court is not permitted "to render a *post hoc* judgment as to what the order was *intended* to say" (emphasis in original).

Chick Kam Choo, 486 U.S. at 148.

The District Court injunction order, absolutely contradicted by the record, contended that the Petitioners were "attempting to get another court to alter the final judgment of this court on the very issue

this court has ruled," and implied that its prior order included consideration and resolution of "the duty of the defendants to deal fairly with the plaintiffs . . . ." (App. C at 14a). But the contention that Monsanto failed to perform its obligations in accordance with its duty of good faith and fair dealing was not mentioned whatsoever, much less "actually decided" in the District Court's earlier order. (*See* App. F, 21a – 38a).

The Eleventh Circuit observed that the District Court had subjectively interpreted its prior order, noting that it "enjoined plaintiffs from, *in the [district] court's view*, attempting to challenge the court's October 2003 order . . . ." (App. B at 5a) (emphasis added). Despite *Chick Kam Choo*'s prohibition against such post *hoc* revision, *see* 486 U.S. at 148, the Eleventh Circuit affirmed the District Court's injunction of the Missouri action.

B. The "Necessary In Aid Of Litigation" Exception Is Inapplicable Because the District Court Lacked Jurisdiction Over the Claims Petitioners Sought to Pursue in Missouri.

Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281 (1970), addresses the "necessary in aid of" jurisdiction exception to the Anti-Injunction Act. A federal court cannot enjoin state court proceedings merely because the federal court itself also has jurisdiction over the same or similar claims. *Id.* at 294-95. Moreover, "it is not enough that the requested injunction is related to [the federal court's] jurisdiction, . . . it must be 'necessary in aid of' that jurisdiction." *Id.* at 295. Although the language

of the exception "is admittedly broad," this Court nonetheless concluded "that it implies something similar to the concept of injunctions to 'protect or effectuate' judgments." *Id.*

Atlantic Coast Line does not permit invocation of the "necessary in aid of jurisdiction" exception in this case. Nothing about Plaintiffs' Missouri action threatens the District Court's continuing jurisdiction to enforce the express terms of the settlement. Given that the "necessary in aid of jurisdiction" exception is similar to the relitigation exception, a federal court can only enjoin state court proceedings that seek to relitigate the exact issues both presented to and actually decided by the federal court.

Petitioners did not seek to challenge the settlement of the underlying litigation in Missouri. Nor did Plaintiffs seek in Missouri to challenge the District Court's determination as to the meaning of the express terms of the settlement agreements. Because Petitioners did not seek to relitigate those issues, nothing about the Missouri action threatened the District Court's continuing jurisdiction to enforce the settlement.

Indeed, the "necessary in aid of jurisdiction" exception could apply only if the District Court had jurisdiction over Petitioners' state-law claims. Here, the District Court's continuing jurisdiction was narrowly tailored, and exercised in the interpretation and enforcement of the express language of the settlement agreements. The District Court "retain[ed] continuing jurisdiction of this matter **for the purpose of enforcing the Settlement Agreement, as**

permitted by *Bender v. Allegra*, 130 F.3d 990 (11th Cir. 1997)." (Record 201 at 3) (emphasis added).

Bender is inapposite. Per a settlement stipulation, the defendant corporation in *Bender* agreed to pay money and to provide warrants to purchase corporate stock. *Id.* at 991. The district court retained continuing jurisdiction over the stipulation and the parties to it. *See id.* at 992. Following the performance of the stipulation (*i.e.*, money paid, warrants issued), the defendant corporation announced a large financial loss, and the price of the defendant's stock – and, in turn, the value of the warrants – fell dramatically. *Id.* at 992-93. The *Bender* plaintiffs moved to enforce the stipulation, alleging breach of the covenant of good faith and fair dealing, and fraud on the court, or, alternatively, that mutual mistake required rescission. *See id.* at 993. The district court denied the motion, concluding that it had no authority or jurisdiction to consider the plaintiffs' motion because there was nothing left to "enforce" with respect to the stipulation. *Id.*

On appeal, the Eleventh Circuit noted that the district court had retained jurisdiction to "enforce" the settlement agreement, as permitted by *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 114 S. Ct. 1673 (1994). The Eleventh Circuit reasoned that the *Bender* plaintiffs' motion had sought relief beyond the court's retained jurisdiction. *Bender*, 130 F.3d at 994-95. Thus, per the *Bender* majority, the retained jurisdiction to enforce the settlement did not include authority to exercise ancillary jurisdiction over the plaintiffs' motion, including the plaintiffs' claims that the defendant had breached the duty of good faith and

fair dealing in the performance of the stipulation. *Id.* at 995.

The *Bender* dissent asserted that "[p]art and parcel of the settlement agreement was the duty of good faith imposed by Georgia law." *Bender*, 130 F.3d at 995 (Anderson, J., dissenting). "More significantly, the settlement agreement as supplemented by the Georgia law duty of good faith required disclosure of such [anticipated loss] information to the appellants; and the duty of good faith was breached by defendants when they concealed such information for the purpose of artificially inflating the price of the stock . . ." prior to the calculation of the issuance price for the warrants. *Id.* Thus, the dissent believed that the district court's retained jurisdiction to enforce the stipulation included the power to determine whether the defendant had complied with its obligation of good faith in its performance of the stipulation. *Id.* The majority opinion, however, held that all that the district court could do was enforce the settlement agreement per its express terms. *Id.* at 994-95.

Here, Petitioners previously sought to enforce their Settlement Agreement. The District Court interpreted the written language of the two agreements and made an award based on "mathematics." (App. F, at 35a-36a). It did not look behind the language of either agreement to evaluate whether Monsanto had acted in good faith, and never decided this issue. Its opinion addressed only the enforcement of the MFNC per the express terms of the settlement agreements. In light of *Bender*, this is all the District Court had the jurisdictional power to do.

Because Petitioners have claims for Monsanto's breach of the covenant of good faith and fair dealing, conspiracy, fraud, fraudulent conveyance, and a *prima facie* tort, Petitioners filed suit in the Circuit Court of St. Louis County, Missouri. These claims could not have been determined by the District Court under *Bender*. Indeed, these claims have never been determined by any court.

II. Petitioners Have Not Received Due Process of Law.

Petitioners continue to seek nothing more than an opportunity to be heard on the merits of their state-law claims. That opportunity has never been provided. As noted above, the District Court refused to permit discovery and never addressed the merits of Petitioners' claims. Nonetheless, the same District Court held that Petitioners' attempts to get their claims heard interfered with its prior order. Facts that would cause an objective person to reasonably question the District Judge's impartiality required her recusal.

A. Potential Conflicts Required Recusal of the District Judge.

Parties enjoy a "constitutional right to have 'a neutral and detached judge' preside over judicial proceedings." 13A Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, Federal Practice and Procedure, § 3541 (2d ed. 1984) (citing *Ward v. Village of Monroeville*, 409 U.S. 57 (1972)). Accordingly, a judge must recuse herself when her impartiality might reasonably be questioned. 28 U.S.C. § 455(a). The standard for determining recusal under § 455(a) is

"whether an objective, fully informed lay observer would entertain significant doubt about the judge's impartiality." *Thomas v. Tenneco Packing Co., Inc.*, 293 F.3d 1306, 1329 (11th Cir. 2002). But § 455 creates a "bright-line duty on the part of judges to recuse," when appropriate. *In re Bellsouth Corp.*, 334 F.3d 941, 956 (11th Cir. 2003). That is so because "justice must satisfy justice." *Offutt v. United States*, 348 U.S. 11 (1954).

The late appearance of new counsel for Monsanto in this case raised issues that would cause an objective, fully informed lay observer to entertain significant doubt about the judge's impartiality. First, one day before the District Court held a hearing on Petitioners' Motion to Enforce the Settlement, attorney J. Mark White entered an appearance on behalf of Monsanto. At that time, Petitioners were unaware that Mr. White had previously served as an attorney for the Hon. Inge P. Johnson, United States District Judge. When she was confirmed as a District Judge, Judge Johnson resigned from the state bench and faced the denial of her state retirement benefits. Mr. White represented her and successfully secured her benefits. *See Johnson v. Bd. of Control of the Employees' Retirement Sys. of Ala.*, 740 So. 2d 999 (Ala. 1999).

An attorney-client relationship between a judge and one of the attorneys representing a party before her raises the appearance of impropriety and may require recusal. *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101 (5th Cir. 1980); *Texaco, Inc. v. Chandler*, 354 F.2d 655 (10th Cir. 1965); *Catsimatidas v. Innovative Travel Group, Inc.*, No. 84 CIV. 5697

(SWK), 1988 WL 3420 (S.D.N.Y. Jan. 13, 1988); *Smith v. Sikorsky Aircraft*, 420 F. Supp. 661 (C.D. Cal. 1976); *Powell v. Anderson*, 660 N.W. 2d 107 (Minn. 2003). Although "[n]othing in § 455(b) requires a judge to disqualify himself because an attorney in the case is currently representing the judge in a suit for damages, . . . the case seems appropriate for disqualification under § 455(a)." 13A Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, Federal Practice and Procedure, § 3549 (2d ed. 1984). The fact that the representation is in the past does not rule out recusal. *Powell*, 660 N.W.2d at 118.

Compounding the problem, when Mr. White appeared as counsel for Monsanto, he did not disclose his relationship with Judge Johnson. He also failed to comply with the District Court's General Order Regarding Recusal. Per that Order, if the appearance of new or additional counsel "would or might constitute grounds for recusal or disqualification of the judge to whom the case is assigned," the appearance is "ineffective until such time that a motion, seeking leave to add or substitute new counsel, is approved by a district judge or magistrate judge of this court." General Order Regarding Recusal (www.alnd.us courts.gov – General Orders).

Not only did Mr. White fail to comply with the Court's General Order Regarding Recusal, Judge Johnson similarly never revealed that Mr. White had been her personal counsel. The failure to disclose a relationship that might constitute grounds for disqualification, in violation of the District Court's General Order, exacerbates the appearance of impropriety, further supporting recusal under § 455(a).

See generally Leslie W. Abramson, *The Judge's Relative is Affiliated with Counsel of Record: The Ethical Dilemma*, 32 Hofstra L. Rev. 1181, 1189.

Further compounding the appearance of partiality, approximately two weeks prior to Mr. White's appearance, W. Stancil Starnes, of the firm Starnes & Atchison, filed his Notice of Appearance on behalf of Monsanto. Neither Mr. Starnes nor the District Judge disclosed that Starnes & Atchison had recently hired the District Judge's son as a litigation attorney. Neither Mr. Starnes nor the Court complied with the General Order Regarding Recusal. In response to Petitioners' motion to recuse, it was revealed that the District Judge's son was a salaried associate with no equity or ownership interest in the firm. Nonetheless, his presence as an attorney at the firm representing Monsanto raised additional potential bases for disqualification under 28 U.S.C. §§ 455 (b)(5)(ii) and (iii) and, under the circumstances of this case, a certain basis for disqualification under 28 U.S.C. § 455(a).

Title 28 U.S.C. § 455(b)(5)(ii) requires that a judge recuse herself if "a person within the third degree of relationship . . . is acting as a lawyer in the proceeding." Although the District Judge's son never entered a formal appearance for Monsanto, an impartial observer might have questioned whether he had acted as a lawyer for Monsanto because (1) his practice was devoted entirely to litigation and (2) Starnes & Atchison served as counsel for Monsanto in *Abernathy*. *See e.g. Pharmacia Corp. v. McGowan*, 915 So. 2d 549 (Ala. 2004); *Ex Parte Monsanto Co.*, 862 So. 2d 595 (Ala. 2003).

The District Judge's son's employment at the firm apparently representing Monsanto also supported disqualification under § 455(b)(5)(iii). That subsection requires a judge to disqualify herself if a "person within the third degree of relationship . . . is known by the judge to have an interest that could substantially be affected by the outcome of the proceeding." The interest need not be a pecuniary one:

> Some cases also discuss whether the judge's role in the case would advance the relative's non-pecuniary interest such as the reputation of the relative or the firm, or the interest in goodwill which attracts clients. The interests in reputation and goodwill also may create an appearance of impropriety.

Abramson, *supra*, 32 Hofstra L. Rev. at 1188 (citations omitted). Thus, if the District Judge's son's position in the firm might have been enhanced, even indirectly, by rulings from his mother favoring Monsanto, disqualification would have been appropriate. *See also Stephens v. Stephens*, 249 Ga. 700, 292 S.E.2d 689, 692 (1982) ("where the attorney appearing before the judge is the employer of the judge's attorney-son, the judge's 'impartiality might reasonably be questioned' even though his impartiality is not called into question by any other facts."). "The harm caused to the public's confidence in the judicial system by questions as to the impartiality of the judiciary is not eliminated by the fact that the attorney-son is an associate rather than a partner." *Stephens*, 292 S.E.2d at 692.

Finally, even if disqualification were not required under § 455(b), § 455(a)'s general standard supported

recusal. Although cases note that when a judge's relative is an associate in a law firm, "recusal is not mandated," it is necessary to consider the particular circumstances of the case and evaluate whether the judge's impartiality might reasonably be questioned. *See* Abramson, *supra*, 32 Hofstra L. Rev. at 1199 (noting that "a concern for the harm caused to public confidence in the judicial system creates an arguable appearance of partiality even when a nonpartner-relative's firm appears before the judge. The reasonable person may conclude that, "No wonder that party won. The judge's relative works for their law firm!"). An objective, fully informed lay observer would entertain significant doubt about the District Judge's impartiality in this case.

B. Petitioners Have Not Been Permitted Discovery, To Present Evidence, Or To Have Their Claims Heard.

The District Judge who failed to disclose the conflicts above and refused to recuse herself concluded that the language of the settlement agreements was unambiguous and could be interpreted without considering evidence outside of the four corners of the documents. Thus, the District Court refused to allow Petitioners to obtain discovery regarding, or even supplement the record with evidence of, how much money was actually paid per capita to *Abernathy* plaintiffs. The same District Court enjoined Petitioners from pursuing their claims in a Missouri state court.

Monsanto's acknowledged intentional avoidance of the MFNC, and the interpretation of the agreements'

language as successfully doing so, triggered questions regarding whether Monsanto acted in accordance with its obligation of good faith and fair dealing to Petitioners. Per this obligation, parties to an agreement are required "to preserve the spirit of the bargain rather than the form . . ." to insure that the basic purpose of the contract is carried out and to protect the reasonable expectations of the parties. *Hoffman-LaRoche, Inc. v. Campbell*, 512 So. 2d 725, 738 (Ala. 1987). The "spirit of the bargain usually contemplates that a contracting party shall not try to deprive the other of the consideration for which he bargained . . . ." *Id.* (citing *Corbin on Contracts* § 654E(A)).

Monsanto has admitted that it purposefully deprived Petitioners of the benefit of the MFNC. Thus, it is undisputed that Monsanto evaded the spirit of its bargain with Petitioners, under the guise that it had a duty to its shareholders not to trigger the MFNC. (Record 258 at 17). Monsanto's admission raises questions regarding whether, when it entered into both the *Owens* and *Abernathy* settlements, Monsanto acted with the intent to defraud the Petitioners. These issues – independent of the express language of the MFNC and the *Abernathy* settlement – were pursued in the Missouri state court action. But the District Court enjoined that action and refused to permit Petitioners to obtain discovery on these claims.

No court has yet given Petitioners an opportunity to pursue these claims on their merits. Petitioners have received no process, let alone anything resembling due process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this 31st of October 2007.

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ATTORNEYS FOR PETITIONERS

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05-13258-BB

[Filed August 2, 2007]

WALTER OWENS, BONITA GRAY, as next friend, mother and natural guardian of and on behalf of Jozette Gray, AUGATHA CROFT, next friend, mother and natural guardian of above named plaintiffs Dantavis Croft, Jennifer Croft, Niesha Croft and Robert L. Croft,
Plaintiffs-Appellants,

ALICIA WYNN, as Next Friend, mother and natural guardian of and on behalf of Jaylen Wynn, et al.,
Plaintiffs,

OTIS ADAMS, and all of the persons listed,
Intervenor-Plaintiff,

versus

MONSANTO COMPANY,
Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: TJOFLAT, ANDERSON and CARNES, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are Denied.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05-13258

[Filed January 5, 2006]

WALTER OWENS, BONITA GRAY, as next friend, mother and natural guardian of and on behalf of Jozette Gray, AUGATHA CROFT, next friend, mother and natural guardian of above named plaintiffs Dantavis Croft, Jennifer Croft, Niesha Croft and Robert L. Croft,
Plaintiffs-Appellants,

ALICIA WYNN, as next friend, mother and natural guardian of and on behalf of Jaylen Wynn, et al.,
Plaintiffs,

OTIS ADAMS, and all of the persons listed,
Intervenor-Plaintiff,

versus

MONSANTO COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama.
D.C. Docket No. 96-00440-CV-J-J.

Before TJOFLAT, ANDERSON and CARNES, Circuit Judges.

OPINION

PER CURIAM:

The controversy in this case was settled in April 2001. As requested in the settlement agreement, the district court retained jurisdiction to enforce the settlement, including its Most Favored Nations Clause ("MNF"). In October 2003, plaintiffs, the appellants here, moved the court to enforce the MNF clause. They asked the court for leave to conduct discovery and thereafter an evidentiary hearing before the court ruled on their motion. The court granted their motion in part and awarded plaintiffs an additional $1,337,352.20, which the defendant, appellee here, paid into the court's registry.

Plaintiffs appealed the court's order, and we affirmed. *Owens v. Monsanto Co.,* 116 Fed. Appx. 249 (Table). 11th Cir. (Ala.) Aug. 19, 2004, reh'g en banc denied, 123 Fed. Appx. 388 (Table), 11th Cir. (Ala.), Oct. 15, 2004. We found "no abuse of discretion in the district court's refusal to allow the requested discovery prior to ruling on the merits or its refusal to hold an evidentiary hearing. The contracts at issue are unambiguous. We find no error in the court's interpretation of the relevant provisions [, including

the MNF clause,] and thus in its decision ordering [Monsanto] to pay . . . $1,337,352.20."

This case is back before us because the district court, in a comprehensive order entered on June 2, 2005, Doc. 287, enjoined plaintiffs from, in the court's view, attempting to challenge the court's October 2003 order which we affirmed on August 19, 2004. Plaintiffs appeal, contending that the court abused its discretion in entering the injunction, in refusing to recuse, and in disallowing discovery and refusing to hold an evidentiary hearing. For the reasons stated in the June 2 order, we conclude that the court acted well within its discretion in entering the injunction and in denying plaintiffs' request for discovery and an evidentiary hearing. We also find no abuse of discretion in the court's refusal to recuse.

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA EASTERN DIVISION

CASE NO. CV-96-J-440-E

[Filed June 2, 2005]

WALTER OWENS, et al., PLAINTIFFS,	)
v.	)
MONSANTO COMPANY, DEFENDANT.	)

ORDER

Pending before the court is the defendant's expedited motion for injunction to protect and effectuate this court's judgment (doc. 274) and a memorandum in support of said motion (doc. 275), defendant's emergency motion to stay discovery and quash plaintiffs' notice of depositions and requests for production of documents and motion for protective order (doc. 278), plaintiffs' opposition to the emergency motion to stay discovery and quash plaintiffs' notice of depositions (doc. 281), plaintiffs' motion to recuse Hon. Inge Johnson and memorandum in support (doc. 282),

plaintiffs' response to defendant's expedited motion for injunction (doc. 283), defendant's opposition to plaintiffs' motion for recusal (doc. 284) and defendant's reply to plaintiffs' response (doc. 285). The motions were set for hearing on June 1, 2005, at which the plaintiffs were present by and through their respective counsel and in person, and the defendant was present by and through counsel. The court denied the plaintiffs' motion for recusal (doc. 282) and heard argument on the defendant's motion for injunction (doc. 274).

The court having considered the arguments, pleadings and memoranda of the parties, finds that the plaintiffs before this court have filed suit in state court in Missouri concerning facts and issues which were squarely before this court and the Eleventh Circuit Court of Appeals from October, 2003 through August, 2004. In the First Amended Petition for Money Damages, filed in the Circuit Court of St. Louis County, Missouri, the plaintiffs allege that the case is brought "on behalf of 1589 plaintiffs ... against Monsanto Company ("Monsanto") asserting claims in contract and tort arising out of Monsanto Company's refusal to pay the plaintiffs what they are due under a Most Favored Nations Clause ("MFNC").

In their motion to enforce settlement agreement (doc. 231), filed with this court on October 28, 2003, the plaintiffs asked this court "to enforce the settlement agreement entered by the parties on April 26, 2001 ... In Paragraph 4 of its April 25 Order, this Court expressly 'retain(ed) continuing jurisdiction of this matter for the purposes of enforcing the Settlement Agreement and this Judgment ....'" Doc.

231, at 1. The plaintiffs then set forth the contents of the Most Favored Nation ("MFN") clause, which, "expressly provides a remedy to Plaintiffs in *Owens* if, after the *Owens* settlement, Monsanto/Solutia were to settle another multi-plaintiff Anniston PCB case in federal or state court." Doc. 231, at 2. This court, after hearing oral arguments and receiving extensive briefs, issued an opinion on January 8, 2004, awarding the plaintiffs an additional $837.94 each, for a total sum of $1,337,352.20. Doc. 249. However, the plaintiffs were not satisfied. In their motion for reconsideration of the court's Order dated January 8, 2004 and supporting memorandum (doc. 251), the plaintiffs stated:

> The 1596 Plaintiffs in this case, in their Motion to Enforce Settlement Agreement, sought expedited discovery, and evidentiary hearing after the completion of discovery, and following an evidentiary hearing, enforcement of the Most Favored Nations Clause ("MFNC").

The plaintiffs further state that:

> the merits of their claims under the specific terms of the MFNC cannot be fully determined without an evidentiary inquiry into the question of whether the *Abernathy* settlement "results" in the payment directly to the *Abernathy* plaintiffs...
>
> Plaintiffs contend that the Court came up with the wrong answer. But an even more fundamental error is that, in summarily determining the merits of Plaintiffs' claim, the Court deprived the Plaintiffs of their right to

> take discovery and present evidence to show the Abernathy settlement for what it is – a transparent contrivance entered into my (sic) Monsanto, in violation of its duty of good faith and fair dealing ...

Doc. 251. In its January 28, 2004 opinion on plaintiff's Motion for Reconsideration this court stated as follows:

> The plaintiff previously filed a motion to enforce settlement agreement (doc. 231), to which the defendant responded, the plaintiff replied, and the court held a hearing. After hearing, the court issued its Order of January 8, 2004. The plaintiff now complains that the court "decided the merits of Plaintiffs' Motion to Enforce Settlement Agreement without allowing the Plaintiffs to conduct any discovery or present evidence at a noticed evidentiary hearing...."

(Doc. 252).

The most recent ruling on these very issues was November 9, 2004, when the Eleventh Circuit Court of Appeals decision affirming this court's ruling to not allow discovery prior to ruling on unambiguous contracts issued as a mandate. The plaintiffs now request the Circuit Court of St. Louis County, Missouri, to allow them to bring an entirely new case on these very contracts, namely the settlement agreement containing the MFN clause, asserting that the plaintiff's were "in no way given full and fair access to evidence or full and fair freedom to present substantive contentions at a hearing." Plaintiffs' Missouri Complaint, ¶ 7. These are the identical

arguments presented to this court. In fact, in the plaintiffs' demand for judgment in the Missouri case, they request "[m]oney damages as are fair and reasonable as determined by the jury for the failure of Monsanto to pay what it owed plaintiffs pursuant to the Most Favored Nations clause ..." Plaintiffs' Missouri Complaint, at 8.

The plaintiffs argued that, because their Missouri claims are not called a motion to enforce settlement agreement, those claims are not barred as having been fully litigated in this court. However, the court is of the opinion that, regardless of the labels attached to the plaintiffs claims, each and every claim in the Missouri litigation arises out of plaintiffs' desires to receive more money under the MFN clause. That clause was entered between the parties before this court, in the litigation that was before this court, in a settlement agreement over which this court retained continuing jurisdiction in this case for purpose of enforcing that very Settlement Agreement of which the MFN clause is a part. *See e.g.*, First Amended Petition for Money Damages, at 1 and 3 ("The MFNC was negotiated as a part of a settlement between the parties resolving claims of plaintiffs against Monsanto ..." and "plaintiffs bargained for and gained as a major consideration for the settlement the agreement of Monsanto to a MFNC...").

The plaintiffs argue to this court that they are not attempting to litigate the same claims in Missouri because their "claim for breach of the duty of good faith and fair dealing in the performance of the contract ... was not addressed whatsoever in the Court's prior orders." Plaintiff's response to

Monsanto's expedited motion (doc. 283), at 4. The plaintiffs, in their quest for more money, lose sight of the fact that any duty the defendant may have in the performance of "the contract" concerns the MFN clause, as contained in the settlement agreement entered before this court. The sole issue that was before this court, and is now before the Missouri court, is whether or not the defendant breached its obligations under the MFN clause. Attaching different labels or theories to this issue does not change the underlying issue. In other words, apart from the settlement agreement reached by the parties, the plaintiffs have no basis for claiming they are due anything.

Defendant relies on the All Writs Act, 28 U.S.C. § 1651, which allows federal courts to "issue all writs necessary in aid of their respective jurisdictions." *See e.g., Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1099 (11th Cir.2004) (It "is a codification of the federal courts' traditional, inherent power to protect the jurisdiction they already have ..."). The Act allows federal courts "to safeguard not only ongoing proceedings, but potential future proceedings, as well as already-issued orders and judgments." *Klay*, 376 F.3d at 1099. Defendant also relies on the Anti-Injunction Act, 28 U.S.C. § 2283, which states that a "court of the United States may not grant an injunction to stay proceedings of a State court except ... where necessary in aid of its jurisdiction, or to protect and effectuate its judgments."

Here, the plaintiffs asked this court to enforce the settlement agreement and award them more money. This court considered this request and, after

considering the merits of that request, granted the plaintiffs' motion. The plaintiffs appealed to the Eleventh Circuit, which stated this court did not abuse its discretion in not allowing fact discovery on unambiguous contracts.

To obtain a writ under the All Writ's Act, a party need only "point to some ongoing proceeding, or some past order or judgment, the integrity of which is being threatened by someone else's action or behavior." *Klay,* 376 F.3d at 1100. "Proceedings in other courts that involve the same facts as already issued judgments and orders, or that could result in the issuance of an inconsistent judgment, threaten the jurisdiction of the district court enough to warrant an injunction." *Id.*, at 1104. Furthermore, the Eleventh Circuit has approved sanctions against an attorney who interferes with a settlement. *See Henson v. Ciba-Geigy Corp.*, 261 F.3d 1065, 1068 (11th Cir.2001). *Henson* also stated that "a district court has the authority under the Act to enjoin a party to litigation before it from prosecuting an action in contravention of a settlement agreement over which the district court has retained jurisdiction." *Henson v. Ciba-Geigy Corp.* 261 F.3d 1065, 1068 (11th Cir.2001) citing *In re VMS Secs. Litig.*, 103 F.3d 1317, 1324 (7th Cir.1996); *White v. Nat'l Football League,* 41 F.3d 402, 409 (9th Cir.1994); *Wesch v. Folsom,* 6 F.3d 1465, 1470 (11th Cir.1993); *Kelly v. Merrill Lynch, Pierce, Fenner & Smith,* 985 F.2d 1067, 1069 (11th Cir.1993).

Limiting the court's ability to issue writs to protect its judgment is the Anti- Injunction Act, which states that a court of the United Stated "may not grant an injunction to stay proceedings in a State Court except

as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment." 28 U.S.C. 2283. In *Metheny v. Becker*, 352 F.3d 458, 462 (1st Cir.2003), the First Circuit Court of Appeals stated that "under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283, a federal court may enjoin state-court proceedings where necessary ... to protect or effectuate its judgment." *Id., citing Rivet v. Regions Bank*, 522 U.S. 470, 478 n. 3, 118 S.Ct. 921 (1998). In *Rivet v. Regions Bank*, the Supreme Court explained as follows:

> A case blocked by the claim preclusive effect of a prior federal judgment differs from the standard case governed by a completely preemptive federal statute in this critical respect: The prior federal judgment does not transform the plaintiff's state-law claims into federal claims ***but rather extinguishes them altogether***. See *Commissioner v. Sunnen,* 333 U.S. 591, 597, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948) ("The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment" (emphasis added).

Rivet v. Regions Bank of Louisiana, 522 U.S. 470, 476-477, 118 S.Ct. 921, 926 (1998).

The plaintiffs assert that their Missouri litigation is not within any exception to the Anti-Injunction Act, relying on *Chick Kam Choo v. Exxon Corporation*, 486 U.S. 140, 146 108 S.Ct. 1684, 100 L.Ed.2d 127(1988).

The plaintiffs assert that the "relitigation exception" set forth in that case only permits a court to "prevent state litigation of an issue that previously was presented to and decided by the federal court." *Id.* at 147. *See* plaintiff's response (doc. 283) at 3-4. The relitigation exception is "available so long as a state court has not 'finally rejected a claim of res judicata.'" *Battle v. Liberty Nat. Life Ins. Co.* 877 F.2d 877, 882 (11th Cir.1989), (quoting *Parsons Steel, Inc. v. First Alabama Bank,* 474 U.S. 518, 524, 106 S.Ct. 768, 772, 88 L.Ed.2d 877 (1986).

The plaintiffs correctly state the law, but then lose sight of the fact that their latest attempt at litigation falls squarely within the relitigation exception. Regardless of the names the plaintiffs give their claims, those claims arise only from the MFN clause. Without the settlement agreement containing the MFN clause, the plaintiffs would have nothing to litigate. The duty of the defendants to deal fairly with the plaintiffs, assuming such a duty exists, can only arise from the settlement agreement, as that is the sole contract between the parties.

Under either the Anti-Injunction Act or the All Writs Act, the result is the same. The plaintiffs here are attempting to get another court to alter the final judgment of this court on the very issue this court has ruled. In spite of the plaintiffs' arguments otherwise, this is not a matter where the same subject matter or claims are at issue in both a state and federal court. Rather, this is a matter where the plaintiffs, not happy with the final ruling of this court or the Eleventh Circuit's affirmance of that ruling, have gone to a state court and asked that court to reopen the identical

subject on which this court has ruled, namely how much are the plaintiffs entitled to receive under the Most Favored Nations clause. Whether the plaintiffs call it a motion to enforce the settlement agreement, or a claim for breach of contract, the plaintiffs want a court to award them more money under the Most Favored Nations clause, which arose as part of the settlement agreement entered by the parties before this court.

The court can only ponder the inherent conflicts which could arise should the plaintiffs be allowed to proceed with their state court litigation. What would happen if the state court found wholly in the defendants favor? Would the plaintiffs then argue that this court should enjoin the state court from ordering that the defendants are entitled to a refund of the sums they paid under this court's order? Similarly, what if the Missouri court found that the plaintiffs are entitled to some sum other than what this court awarded? Which judgment should prevail? The plaintiffs only recourse to receive more money based on settlements in other litigation against this defendant is through the MFN clause. That clause was entered in the settlement agreement in the litigation before this court, over which this court retained jurisdiction to enforce that settlement agreement for the benefit of both sides to this litigation.

Having considered the foregoing, and being of the opinion the defendant's motion for injunctive relief is due to be granted;

It is therefore **ORDERED** by the court that the defendant's motion for injunctive relief be and hereby is **GRANTED**.

It is **ORDERED, ADJUDGED** and **DECREED** that the plaintiffs in this case, their counsel of record, and their agents, servants, employees, attorneys and all persons acting on their behalf, as well as all persons in active concert or participation with them who receive actual notice of this order are hereby **PERMANENTLY RESTRAINED** and **ENJOINED** from taking any further action to prosecute the cases of *Timothy McRath, et al. v. Monsanto Company,* 05CC-001624, currently pending in the Circuit Court of St. Louis County, Missouri.

The clerk of court is directed to notify the clerk of court for the Circuit Court of St. Louis County, Missouri of this decision.

It is **FOUND** by the court that the defendant's motion to stay discovery is **MOOT**.

DONE and **ORDERED** this the 2nd day of June, 2005.

/s/
INGE PRYTZ JOHNSON
U.S. DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04-10501

[Filed October 15, 2004]

WALTER OWENS, BONITA GRAY, as next friend, mother and natural guardian of and on behalf of Jozette Gray, AUGUST CROFT, next friend, mother and natural guardian of above named plaintiffs Dantavis Croft, Jennifer Croft, Niesha Croft and Robert L. Croft, Plaintiffs-Appellants,	)
ALICIA WYNN, as next friend, mother and natural guardian of and on behalf of Jaylen Wynn, et al., Plaintiff,	)
versus	)
MONSANTO COMPANY, Defendant-Appellee.	)

Decision Without Published Opinion

OPINION

Suggestion for Rehearing En Banc Denied.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04-10501

[Filed August 19, 2004]

WALTER OWENS, BONITA GRAY, as next friend, mother and natural guardian of and on behalf of Jozette Gray, AUGUST CROFT, next friend, mother and natural guardian of above named plaintiffs Dantavis Croft, Jennifer Croft, Niesha Croft and Robert L. Croft,
Plaintiffs-Appellants,

ALICIA WYNN, as next friend, mother and natural guardian of and on behalf of Jaylen Wynn, et al.,
Plaintiff,

versus

MONSANTO COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Alabama

(AUGUST 19, 2004)

Before TJOFLAT, BLACK and BARKETT, Circuit Judges.

PER CURIAM:

We find no abuse of discretion in the district court's refusal to allow the requested discovery prior to ruling on the merits or its refusal to hold an evidentiary hearing. The contracts at issue are unambiguous. We find no error in the court's interpretation of the relevant provisions and thus in its decision ordering Pharmacia to pay the difference in the per capita gross cash recoveries, i.e. $1,337,352.20.

AFFIRMED.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA EASTERN DIVISION

CASE NO. CV-96-J-440-E

[Filed January 8, 2004]

WALTER OWENS, et al., PLAINTIFFS,	)
v.	)
MONSANTO COMPANY, DEFENDANT.	)

ORDER

This cause came on to be heard on the plaintiffs' motion to enforce settlement agreement (doc. 231), the defendant's response and opposition to motion to enforce settlement agreement (doc. 238) and the plaintiffs' reply (doc. 241). The court held a hearing at which plaintiffs were present in person and by and through their counsel of record and the defendant was present through counsel of record. After the conclusion of the hearing, both parties submitted additional post-hearing documents (docs. 245, 247 and 248). The plaintiffs also filed a notice of withdrawal of motion to

enforce settlement agreement as to Solutia, Inc., a non-party (doc. 246). The court having considered the submissions and arguments of the parties, the court finds as follows:

As stated in the plaintiffs' Response to Defendant's Post-Hearing Submission (doc. 248), "[t]he question before the court is a simple one: Did Monsanto settle the *Abernathy* case under terms that required Monsanto to pay directly to the *Abernathy* plaintiffs a total sum that, when divided by the total number of named *Abernathy* plaintiffs, yielded a per capita gross cash recovery in excess of $20,676.69?" Pursuant to paragraph 11 of the settlement agreement plaintiffs entered with the defendant on April 25, 2001, they argue that they are entitled to "Most Favored Nation" status, meaning that these plaintiffs shall receive no less per capita than the amount received by any other plaintiff in a lawsuit of the type defined by paragraph 11.

Paragraph 11 of the April 25, 2001 settlement agreement states in relevant part:

> Most Favored Nation Clause: Monsanto/Solutia agree that if they enter into any future settlement of all or part of a multi-plaintiff PCB/Anniston plant-related lawsuit pending as of the date of this Agreement [or, as to a multi-plaintiff PCB/Anniston-related lawsuit filed after the date of this Agreement, if they enter into a settlement agreement within thirty-six months of the date of this Agreement], the terms of any such future settlement shall be compared to the terms of this Agreement based

solely upon the net present value of the per capita gross cash recovery per settling plaintiff. For purposes of this paragraph, the following definitions apply:

....

"Multi-plaintiff PCB/Anniston plant-related lawsuit" means a civil action filed in any state or federal court involving the claims of more than 50 individual plaintiffs ..., but excludes the consolidated cases styled Thomas C. Dyer et al. v. Monsanto Company, et al., Civil Action No. CV-93-250, and Shelter Cove Management, Inc., et al. v. Monsanto Company, et al., Civil Action No. CV-94-50-PH.

"Per capita gross cash recovery" means the net present value as of the date of the future settlement agreement of the total amount of money Monsanto/Solutia is required to pay directly to named plaintiffs under the terms of said future settlement agreement divided by the total number of named plaintiffs in the lawsuit being settled .... For example, the parties agree that the net present value of the per capita gross cash recovery per settling named plaintiff under the terms of this Agreement is equal to $33,000,000 ÷ 1596 = $20,676.69.

In the event Monsanto/Solutia enter into a settlement agreement after the date of this Agreement in another multi-plaintiff PCB/Anniston plant-related lawsuit that is subject to this paragraph and that results in a net present value of the per capita gross cash

> recovery that exceeds $20,676.69, then Monsanto/Solutia shall make additional payments under the terms of this paragraph as may be necessary to make the net present value of the per capita gross cash recovery in this lawsuit equal to the net present value of the per capita gross cash recovery in such other settlement. Such payment shall be ... paid within thirty (30) days of the payment date when the payment is made under such future settlement agreement or, if such future settlement agreement establishes a schedule for the payments covered by this paragraph, then payment to Plaintiffs under this paragraph shall be made within 30 days of each payment date under such future settlement agreement beginning with the payment date on which the sum of such payments under the future settlement agreement on a per capita gross recovery basis exceeds the per capita gross recovery per settling plaintiff under this Agreement. If Monsanto/Solutia contests or fails or refuses to make a payment under the provisions of this paragraph when it is due, Monsanto/Solutia shall pay interest on the past due amount at the prime rate reported in the *Wall Street Journal* on the due date of that payment, such interest running from the due date of that payment until the date of payment of the amount due.

Owens Settlement Agreement, ¶ 11 (plaintiffs' Exhibit 1).

The defendant does not dispute that the *Owens* plaintiffs are entitled to Most Favored Nation ("MFN") status. Rather, the defendant argues that the plaintiffs in the *Tolbert* and *Abernathy* cases actually received less than the *Owens* plaintiffs.

The court must first determine whether the Global Settlement Agreement, entered in the cases of *Abernathy v. Monsanto* and *Tolbert v. Monsanto* is truly one agreement, as argued by the defendant, or really two agreements that are separate albeit contingent upon each other, as argued by the plaintiffs. The court has reviewed the document entitled "Settlement Agreement" entered in the case *Abernathy, et al. v. Monsanto Company, et al.*, CV 01-832, in the Circuit Court of Etowah County, Alabama; the document entitled "Settlement Agreement" entered in the case *Tolbert, et al., v. Monsanto Company, et al.*, CV 01-C-1407-S, in the United States District Court for the Northern District of Alabama; and the document entitled "Global Settlement Agreement" entered in both of the above courts in both of the above-styled cases. The court finds that the Most Favored Nations clause ("MFN"), *supra*, is stated in terms of "settlement agreement," and not "lawsuits."

The defendant argues that, because the *Abernathy* and *Tolbert* settlements were contingent upon each other, the court must consider the two settlements, each entered in its respective case, as one settlement agreement. The court disagrees. Although the settlements were contingent upon each other, they are both structured as independent settlements, entered in two separate courts in two separate cases. Just as the parties entered one "Global Settlement Agreement"

for submission to two separate courts, the parties could have, but did not, enter one "Settlement Agreement" setting forth the terms of settlement for both cases.[1] As such, the court considers only the *Abernathy* settlement for purposes of determining the "gross per capita recovery" as required by the MFN clause at issue here.[2]

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[1] For example, the Global Settlement Agreement states "A copy of the Settlement Agreement for the Abernathy and related cases is attached hereto as Exhibit A. A copy of the Settlement Agreement for the Tolbert and related cases and unfiled claims is attached hereto as Exhibit B. Those agreements are incorporated herein." *See* plaintiff Exhibit 3. Clearly, this anticipates two ***separate*** settlement agreements being incorporated in the Global Settlement Agreement. The court also notes that both the *Abernathy* and *Tolbert* cases were actually consolidated cases, *Abernathy* incorporating seven separate lawsuits and *Tolbert* incorporating two separate lawsuits. *See* plaintiff Exhibits 2 and 3.

[2] The parties do not dispute that, if the *Tolbert* settlement is considered either on its own or in conjunction with the *Abernathy* settlement, the MFN clause is not triggered. Although the *Owens* plaintiffs' counsel insists the *Abernathy* plaintiffs received more than the *Owens* plaintiffs, he stated he did not know the exact number of *Abernathy* plaintiffs. In plaintiffs' motion to enforce settlement agreement, plaintiffs' counsel suggested 3,500 *Abernathy* plaintiffs as an estimate. Plaintiffs' motion to enforce at 5. At the hearing on that motion, plaintiffs' counsel stated that the total amount of money paid pursuant to the *Abernathy* Settlement Agreement had to be divided by the total number of *Abernathy* plaintiffs, but could not report to the court how many *Abernathy* plaintiffs there were. This is relevant because, without

The *Abernathy* litigation was settled for $300 million. The parties dispute how much of that settlement should be counted for purposes of making the comparative calculation required by the MFN clause. While both parties agree that only sums paid "directly" to the plaintiffs should be included in this calculation, they dispute which portions of the *Abernathy* Settlement Agreement fall within this classification. The plaintiffs assert that the entire $300 million should be used in this calculation. The defendant argues that the same funds which were removed from the calculation in the *Owens* calculation also be removed from the *Abernathy* settlement to compare "apples and apples."

By the terms of the MFN clause, only sums paid "directly to named plaintiffs" are used to determine the per capita gross cash recovery. *See, Owens* Settlement Agreement, ¶ 11, p. 15. Subtracted from the total amount of the settlement agreement in *Owens* were the "Relocation/Property Adjustment Fund," of $2,500,000.00; the "West Anniston Community Foundation" fund, of $3,500,000.00; and $1,000,000.00 designated as "costs." The plaintiffs argue that funds designated identically to these in the *Abernathy* settlement should not be deducted from the per capita gross cash recovery.

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an exact number, the court cannot ascertain the amount of money, if any, due the *Owens* plaintiffs under the MFN clause. However, the defendant represented to the court that the actual number of *Abernathy* plaintiffs is 3,486.

A. Relocation / Property Adjustment Fund:

With regard to the "Relocation/Property Adjustment Fund" of $150 million in the *Abernathy* settlement, the *Owens* plaintiffs assert this amount should be included in the per capita calculation because the money is paid directly to plaintiffs' counsel. In the *Owens* settlement, the money was paid pursuant to a 1995 Monsanto Property Purchase Program. That Agreement states the money shall:

> be paid in such sums as set forth hereinafter to certain plaintiff property owners and residents for relocation/property adjustment in the areas described in Exhibits A and B. The relocation/property adjustment funds shall be used for the purchase of properties ... the payment of monies to certain plaintiff property owners ... and the purposes described in paragraph 5)i).

Owens Settlement Agreement, ¶ 5.b. The *Owens* Agreement continues that "individual payments to individual plaintiff owners and residents shall be made, without adjustment for net present value ..." *Id.*, ¶ 5.c. Further still, the Agreement specifies that:

> The remainder of the said $1.5 million amount, if any, will be paid by [defendant] to an escrow account designated by Plaintiffs' Counsel .... any funds that remain available after completion of the payments to eligible plaintiff property owners and residents in the Lincoln Park and the 11th/12th Street relocation/property adjustment areas and the payment to any

> eligible plaintiff owner for the purchase of business property located in the original October 1995 Property Purchase Program area shall be paid to eligible plaintiffs in accordance with the provisions of Exhibit E.

Id., ¶ 5.g.

Likewise, the *Abernathy* Agreement reads as follows:

> One Hundred and Fifty Million Dollars ($150,000,000.00), plus any interest accrued on such amount during the time such amount during the time such money was on deposit in the Settlement Account and the Escrow Account, shall be paid directly from the Escrow Account to plaintiffs' counsel and to a fund or funds established by plaintiffs' counsel for relocation/property adjustment payments to plaintiffs as follows: ....
>
> ii. The remaining Ninety Million Dollars ... plus any interest accrued ... shall be paid to a Relocation/Property Adjustment Fund Account or Accounts designated by plaintiffs' counsel for payments for the benefit of the approximately 920 plaintiff property owners and other plaintiff residents for property relocation/adjustment.

Abernathy Settlement Agreement, ¶ 3.f. The plaintiffs' argument centers around the fact that the *Abernathy* agreement pays the funds to plaintiffs' counsel for disbursement to plaintiffs, whereas the *Owens* agreement pays the funds to a third party for

disbursement to plaintiffs. The court fails to find any significance attached to the entity who distributes the funds in question to the plaintiffs. Similarly, while the plaintiffs assert the *Abernathy* fund is different because the relocation program was created by the settlement rather than a pre-existing program as in *Owens,* the court finds this difference insignificant.

Regardless of who administers the payments to the plaintiffs, or when the fund itself was created, the two Relocation/Property Adjustment Funds have the same essential purpose - compensation of the plaintiffs for injury to the value of their properties.[3] Both Settlement Agreements anticipate payment of funds to less than all of the plaintiffs in their respective cases.[4] Because this fund was excluded from the calculation of the per capita gross cash recovery per settling plaintiff for the MFN clause in *Owens*, the court finds the same should be excluded for calculation purposes in the *Abernathy* settlement agreement.

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[3] The Plaintiffs argue that the *Abernathy* Relocation/Property Adjustment fund will be used for direct cash payments to the plaintiffs. However, in *Owens*, the money in question was also used for direct cash payments to the plaintiffs. In both cases, property owners and others receive cash payments for the damage to their property.

[4] The court finds nothing sinister in the much greater value of the Relocation/Property Adjustment fund in *Abernathy*. That case had already been tried in part, to a jury, which had rendered verdicts totaling more than $100 million for some of the *Abernathy* plaintiffs' property damage from PCB contamination.

B. West Anniston Community Foundation / HEW Funds

The plaintiffs argue that, because in their Settlement Agreement, the foundation created was required to take the form of a § 501(c)(3) corporation, these funds were properly excluded in calculating the per capita gross cash recovery per settling plaintiff, but the same exclusion is not appropriate in the *Abernathy* settlement. The language in the *Owens* settlement agreement states:

> The West Anniston Community Foundation ... shall be formed by Plaintiffs' counsel as a nonprofit corporation, foundation or other appropriate entity. It is the intent of the parties that the Foundation be constituted under any applicable law governing non-profit charitable organizations in order to qualify for tax-exempt treatment within the meaning of section 501(c) of the Internal Revenue Code. The Foundation shall be established for the following general purposes, and will have the authority to expend funds for such purposes but will not be required to perform every such purpose:
>
> 1) To provide primary health care and/or to assist in gaining access to primary health care and other health care services ... to the economically and socially disadvantaged current and former residents of the West Anniston area of Anniston, Alabama who may have been exposed to the discharge of PCB's into the environment. The Foundation may make grants or payments for the actual benefit of such residents meeting The

> Foundation's criteria, or, in the sole discretion of the Board of The Foundation, to local clinics or other health care providers to support the provision of health care services and/or related services, such as transportation to such residents;
> 2) To provide educational grants, scholarships, or loans to such residents and their families and/or to schools or other educational institutions or providers for the actual benefit of such residents for such educational services as the Board of Directors of the Foundation ... may deem necessary or appropriate ....
> 3) To provide health education and instruction to or on behalf of such residents; and
> 4) To provide such other programs relating to health, education and community welfare that would actually benefit such residents.

Owens Settlement Agreement, ¶ 4)a) 1)-4).

The *Abernathy* Settlement Agreement also requires the creation of a foundation. The relevant language from that Agreement reads as follows:

> Thirty-Five Million Dollars ($35,000,000.00), plus any interest accrued on such amount ... shall be paid directly from the Escrow Account to plaintiffs' counsel and to a corporation, foundation, trust or other appropriate entity designated by plaintiffs' counsel as follows: ....
>
> ii. Twenty-One Million Dollars ($21,000,000.00), plus any interest accrued on such amount ... shall be used by the

corporation, foundation, trust or other appropriate entity for the following general purposes, and the corporation, foundation, trust or other appropriate entity for the following general purposes, and the corporation, foundation, trust or other entity will have the authority to expend funds for such purposes, but will not be required to perform every such purpose:

(1) To provide primary health care and/or to assist in gaining access to primary health care and other health care services ... by making grants or payments for the actual benefit of persons meeting the criteria of the corporation, foundation, trust or other entity;

(2) To provide educational grants, scholarships, or loans to persons meeting the criteria of the corporation, foundation, trust or other entity for purposes including but not limited to those described in subparagraph (5) below:

(3) To provide health education and instruction to or on behalf of persons meeting the criteria of the corporation, foundation, trust or other entity;

(4) To provide such other programs or payments relating to health, education and community welfare that would benefit such persons meeting the criteria of the corporation, foundation, trust or other entity; and

(5) To create an educational trust fund to endow scholarships, grants or loans for

> purposes including but not limited to the evaluation of and development of personal education plans ....

Abernathy Settlement Agreement, ¶ 3.g.ii(1)-(5).

The funds created by both the *Owens* and *Abernathy* settlement agreements have the same purposes, the same goals, and incorporate much of the same language. The fact that the *Owens* fund states a preference for creation of a non-profit corporation while the *Abernathy* fund is not so explicit does not change the nature of the fund itself. Both funds have as their purpose the creation of some type of foundation for the betterment of the health, education and general welfare of individuals affected by PCB contamination in the Anniston, Alabama area. The fact that plaintiffs' counsel in *Abernathy* retain some control over the fund created in their settlement agreement does not change the ultimate recipients of the fund.[5] As such, the court finds this fund is properly excluded from the MFN clause calculation required by the *Owens* Settlement Agreement.

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[5] Plaintiffs' counsel argues that the community fund created by the *Owens* settlement has to be used for the benefit of the community. He stated he could not tell the court as of the date of the hearing what the *Abemathy* fund would go to, but that it *could* be given to the *Abernathy* plaintiffs because of the lack of a mandated 501(c) corporation. The court finds such speculation to be insufficient to find the funds in question will not be used for the benefit of the community.

Costs

The plaintiffs argue that, although in the calculation of the average per capita payment in the *Owens* settlement costs were excluded, the fifteen million dollars paid for this purpose in the *Abernathy* settlement should not be so excluded. Plaintiffs argue that this amount for costs is too high to be realistic, although the *Abernathy* case was actually tried to a jury for a full year before a settlement was entered. The plaintiffs also argue that, in the *Owens* settlement, the "costs" designation was merely a way to lower the calculated average per capita payment, and was really money paid to the plaintiffs after plaintiffs' counsel retained 40% for attorneys' fees. The plaintiffs argue that, should the funds designated as "costs" in *Abernathy* also be split between plaintiffs and attorneys in this manner, the amount is being paid "directly to the plaintiffs." Thus, the plaintiffs conclude, these funds, designated identically, should count toward the calculation for purposes of the *Abernathy* settlement, but not their own. Having considered both parties' arguments, the court is of the opinion that, because costs were excluded from the MFN clause calculation in the *Owens* Settlement Agreement, they should likewise be excluded from that calculation in the *Abernathy* Settlement Agreement.

The court therefore finds the appropriate equation to determine the amount each *Abernathy* plaintiff received, in direct cash payment, to be as follows:

$300 million
- 150 million (Property/Relocation Fund)
- 60 million (Foundation)
- 15 million (costs)
$ 75 million

$75 million ÷ 3,486 *Abernathy* plaintiffs = $21,514.63

Therefore, the court must use the amount of $21,514.63 per capita gross cash recovery for purposes of the MFN clause under the *Owens* Settlement Agreement. This amount is more than the $20,676.69 per capita gross cash recovery received by each of the *Owens* plaintiffs.

The defendant asserts that the amount specified by the *Owens* Settlement Agreement of $20,676.69 must be brought to present cash value and therefore multiplies this amount by 5% as "simple interest" to reach a total of $23,257.03 per *Owens* plaintiff. The defendant therefore concludes that the *Abernathy* plaintiffs received less than the *Owens* plaintiffs. The court can find no justification for bringing the amount specified by the *Owens* MFN clause to "present cash value." While 5% interest does appear in the *Owens* Settlement Agreement, it is not in the MFN clause. No mention of any such calculation appears in the MFN clause. Had the defendant wanted this hedge against inflation in the *Owens* Agreement, it should have included the same then. The court will not rewrite the

settlement agreement now to prevent application of the MFN clause.[6]

Based on the foregoing determinations, the court finds that the Owens plaintiffs are due sums as follows:

Abernathy per capita recovery: $21,514.63
Owens per capita recovery: - 20.676.69
$ 837.94 due each of the Owens plaintiffs

In accordance with the foregoing, the court finding the MFN clause required payment from defendant to the plaintiffs in the *Owens* litigation, the defendant is **ORDERED** to pay the plaintiffs the sum of $837.94 x 1,596 (number of *Owens* plaintiffs) = $1,337,352.20. Said sum is due and payable in accordance with the MFN clause in the *Owens* settlement agreement, to wit: "within thirty (30) days of the payment date when payment is made under such future settlement agreement or, if such future settlement agreement establishes a schedule for the payments covered by this paragraph, then payment to the Plaintiffs under this paragraph shall be made within 30 days of each payment date under such future settlement agreement

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[6] The court finds no basis in the Agreement for any such adjustment. This is especially true in light of the fact that the MFN clause does not continue in perpetuity. Rather, it is limited to lawsuits pending at the time the Owens Settlement Agreement was entered or future filed litigation settled within thirty-six months of the Owens Settlement Agreement.

...." *Owens* Settlement Agreement, ¶ 11. Should said payment not be made in a timely fashion as required by the MFN clause, then said payment shall be made with interest at the prime rate reported in the *Wall Street Journal* on the date that payment should have been made, such interest running from the due date of that payment until the date of payment of the amount due. *See, Owens* Settlement Agreement, ¶ 11 (p. 16).

It is further **ORDERED** by the court that the plaintiffs' motion for a scheduling conference (doc. 236) is **DENIED.**

DONE and **ORDERED** this the 8th day of January, 2004.

/s/
UNITED STATES DISTRICT JUDGE
INGE P. JOHNSON